

## Oral Argument

## TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL MOSMAN

UNITED STATES DISTRICT COURT CHIEF JUDGE

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## (P R O C E E D I N G S)

(April 6, 2018)

1 MS. POTTER: Good afternoon, Your Honor. We're here  
2 in the matter of the United States versus Jamie Cobat,  
3 16-cr-0187. Amy Potter, Helen Cooper, and Gavin Bruce on  
4 behalf of the United States. Ms. Cobat is present and  
5 represented by Mark Ahlemeyer, and we're here ready to proceed  
6 on his motions.

7 THE COURT: Good afternoon.

8 MR. AHLEMAYER: Good afternoon, Your Honor. Would  
9 you like me to proceed on my arguments? Or if the Court wants  
10 to direct me in a certain topic, I'm happy to address any of  
11 the Court's concerns.

12 THE COURT: Let me raise a concern that might shape  
13 the direction of argument a little, and then depending on the  
14 answer to that question, I think I'll know which of two paths  
15 to take, in terms of oral argument.

16 So we're here both on a motion for new trial and a  
17 motion to dismiss, and that motion for new trial is grounded  
18 principally in *Brady* violations, alleged *Brady* violations, with  
19 the possibility that it also raises the sort of false testimony  
20 prong of both dismissal and new trial.

21 I'm going to start by talking about new trial. And  
22 so there's been the *Mooney-Napue* line of cases about how to  
23 think about false testimony, but before we get that far, I sort

1 of have to figure out what went wrong here and what didn't, and  
2 then we can proceed to analyze how *Brady* and other doctrines  
3 apply.

4 So it seems to me that -- well, the *Brady* pleading  
5 sets out three things that should have been produced that  
6 weren't: deposit records showing which benefits Ms. Cobat  
7 received -- showing which of the benefits Ms. Cobat received  
8 were TANF benefits; the DHS TRACS narratives from January 17,  
9 showing Ms. Cobat requested certain records from DHS; and then  
10 evidence that the TANF benefits were not federally funded.

11 Those are the three main categories of documents you,  
12 Mr. Ahlemeyer, say were not produced that should have been; is  
13 that right?

14 MR. AHLEMEYER: Yes, that's correct, Your Honor.

15 THE COURT: Am I missing anything?

16 MR. AHLEMEYER: Well, I suppose what I don't know,  
17 you know -- I produced Exhibit C as the one document I had  
18 showing -- suggesting that it was state funds at issue. So I  
19 imagine there are significant other evidence out there  
20 establishing direct funding lines. I just don't have that  
21 evidence. I don't know what it necessarily looks like at DHS.

22 THE COURT: So my fourth category is a question, not  
23 a category for -- I guess for the United States first. I'm in  
24 a similar position. As I look at this briefing, including the  
25 post-trial production of information, I'm no longer clear in my

1 mind how the government knows if any of this TANF money was  
2 federally funded; in other words, if any of it was, for our  
3 trial's purposes, the TANF money that was charged in Count 3,  
4 as opposed to less than a thousand.

5 MS. POTTER: Your Honor, there are two different  
6 types of benefits that she received. There are the benefits  
7 that are what we would call standard TANF benefits, and those  
8 are the ones with the account that begins with the letter A.  
9 And we have confirmed -- and it's in the declaration of  
10 Ms. Cooper -- that those are federally funded. It's a very  
11 specific category of TANF, which is called pre-SSI TANF, which  
12 is essentially a loan on SSI someone is going to receive. The  
13 State of Oregon funds that.

14 So there is a crossover period. It's less than a  
15 thousand dollars because we agree that the pre-SSI TANF were  
16 not federally funded. And that's why we've moved to vacate  
17 Count 3.

18 THE COURT: Mr. Ahlemeyer, let me turn to you. Are  
19 you here today taking the position, in light of all of the  
20 current documentation, that there now, as opposed to trial,  
21 there now is a reasonable doubt as to whether any of the money  
22 was the sort of TANF money that would -- that was charged in  
23 Count 3? We'll call it federally funded.

24 MR. AHLEMAYER: By my count, based on the coding, I  
25 believe there is at least two deposits of \$133 within the time

1 frame of the indictment that was traditional TANF.

2 THE COURT: Which you contend is proof beyond a  
3 reasonable doubt of that? I don't mean "contend." Do you  
4 admit?

5 MR. AHLEMEYER: That she received those two deposits  
6 under that coding. That's as far as I can say, Your Honor, is  
7 that they're coded the way I read TANF benefits.

8 THE COURT: I'm really just trying to understand your  
9 argument, what you are and are not arguing.

10 Are you arguing that in light of everything we now  
11 know, as you've described it, some confusion in the  
12 documentation, there's any reasonable doubt as to the validity  
13 of Count 3, not just on it being less than a thousand dollars,  
14 but on her being guilty of it at all?

15 It sort of plays out like this in the analysis, that  
16 if there's less than a thousand dollars of TANF funding, then  
17 the statements that she got TANF money and that she's lying  
18 when she said she didn't, you know, and that sort of thing, end  
19 up not being false. They don't establish a jurisdictional  
20 amount if they're -- if Ms. Austin's testimony, for example,  
21 doesn't end up being false.

22 If you're contending that there's a reasonable doubt  
23 that it satisfied the count at all, then there's a concern  
24 about whether false testimony was given. And I don't know  
25 which is your position.

1                   MR. AHLEMEYER: Your Honor, I guess I would say I  
2 believe there is reasonable doubt on the count itself because I  
3 think the *Brady* evidence breaks down both in sort of intent,  
4 what Ms. Cobat understood to be happening, that's one category,  
5 and then the other category being whether it was actually  
6 federally funded.

7                   In terms of whether it's federally funded, I'm in the  
8 same position that really Ms. Cobat was pretrial, which is I  
9 have the government telling me that these two deposits are  
10 federally funded. I have no independent evidence of that, and  
11 that's really the best I can say on that.

12                  THE COURT: Telling you in what way?

13                  MR. AHLEMEYER: Through the testimony of Ms. Austin  
14 and in discovery, basically statements by those investigators  
15 that yes, TANF is federally funded, as well as the government's  
16 continued arguments of that. Just as I have no independent  
17 source of proving that the pre-SSI is not federally funded, I'm  
18 relying a little bit on the government on this. I don't have  
19 independent proof either way about whether federal funds  
20 directly fund TANF.

21                  But if I may, Your Honor, I don't fully agree with  
22 the response and analysis of Investigator Austin's testimony,  
23 in the sense that she said both, that TANF is primarily  
24 federally funded and that Ms. Cobat received \$2,845, or  
25 whatever the amount is. So I think those two statements are

1 very connected, and even if she's off on the amount, I think  
2 that still is false testimony.

3 THE COURT: So Count 3 charges receipt of TANF money.  
4 Now, I'm curious whether if the money was federally funded but  
5 pre SSI, you view your client as raising issues about Count 3's  
6 validity, separate from the jurisdictional problem.

7 MR. AHLEMEYER: Yes, Your Honor.

8 THE COURT: But you don't know?

9 MR. AHLEMEYER: Well, I certainly raised that in our  
10 initial motion for a new trial. That was really the ultimate  
11 focus of that, was that she believed -- and her intent is  
12 obviously critical in any theft case. She believed she was  
13 receiving pre-SSI linked to her own disability. So we raised  
14 the *Brady* point at that point, based on that evidence. We  
15 raised the possibility -- and I certainly want to address the  
16 government's response to that, but we raised the possibility in  
17 December that these funds were not federally derived or  
18 federally owned. We had both claims at that point, but I did  
19 not raise the *Napue* argument at that point because without that  
20 jurisdictional problem, I agreed at that point that  
21 Ms. Austin's testimony did not fall under that doctrine. But  
22 with what I know now, I believe it did, and that's why I raised  
23 it in the supplemental briefing.

24 THE COURT: You did because you believe her testimony  
25 claimed 2,000-plus dollars of federally funded TANF funds?

1 MR. AHLEMEYER: Exactly, Your Honor.

2 THE COURT: All right. Thank you.

3 So I think this issue might fall out, but I'm still  
4 not sure. I'm not asking about the division between federal  
5 and state. I mean, if you had to outline for a jury right now  
6 why -- if there were no jurisdictional element to Count 3, and  
7 you just had to say, well, some of this money was not pre-SSI  
8 and not SNAP and not something else, but federally funded TANF  
9 money, what would your proof be?

10 MS. POTTER: Well, Your Honor, one thing I want to  
11 clarify is that pre-SSI is a TANF benefit. It's a benefit  
12 provided under the TANF program. So we, as an initial matter,  
13 would argue that all of those benefits were a type of TANF.

14 In terms --

15 THE COURT: I guess I'm aware of that, but concerned  
16 about what Count 3 charged. In your view, what did Count 3  
17 charge?

18 MS. POTTER: Count 3, as indicted, charged theft of  
19 government property. So we charged the receipt of federally  
20 funded -- the theft of federally funded benefits. So --

21 THE COURT: Through a -- I mean, you have three  
22 counts of theft of government property.

23 MS. POTTER: The TANF program.

24 THE COURT: And Count 2, remind me, is?

25 MS. POTTER: Count 2 is -- Count 1 is the wire fraud,

1 Count 2 is the SSI, and Count 4 is the TANF. So Count 4, yeah.

2 THE COURT: So, in your view, even if the money  
3 somehow labeled pre-SSI, it fits within not Count 2 or anything  
4 else, but Count 3 of the charged -- the conduct in Count 3?

5 MS. POTTER: It's in the Count 3, in that it's TANF.  
6 We lacked jurisdiction over the funds that were not federally  
7 funded. So it's somewhat like a bank robbery where we failed  
8 to establish the bank was insured by the Federal Deposit  
9 Insurance Corporation. You still robbed the bank, but if it's  
10 not insured, the federal government lacks jurisdiction.

11 So to the extent that we can no longer prove that  
12 more than a thousand dollars of the TANF benefits are federally  
13 funded, we have moved to vacate Count 3, but the application  
14 and the requirement that she have a child living in her home  
15 remained, whether it was traditional TANF or this pre-SSI TANF.  
16 So to the extent --

17 THE COURT: What do you make of Mr. Ahlemeyer's  
18 argument that Ms. Austin actually testified at trial to the  
19 receipt of plus \$2,000 of TANF money?

20 MS. POTTER: She did testify to that, and that was  
21 accurate. She received two types of TANF. Now, what  
22 Ms. Austin clearly said is that TANF was both federally and  
23 state funded. At a later point in her testimony, she was asked  
24 in total how much TANF was received, and it's the \$2,000  
25 figure. All of that --

1                   THE COURT: Isn't the import of that testimony to the  
2 jury, and, in fact, the use you, the government, made of it to  
3 the jury, proof that 2,000-plus dollars of federally funded  
4 TANF money were received by her?

5                   MS. POTTER: No. I don't believe that her testimony  
6 was that it was federally funded.

7                   THE COURT: That's not my question. My question is  
8 did you use her testimony to prove Count 3 in an amount in  
9 excess of a thousand dollars? In other words, did you take her  
10 statement that she received \$2,000 of TANF money in order to  
11 persuade the jury that she had received \$2,000 of federally  
12 funded TANF money?

13                  MS. POTTER: I think what we did was take the  
14 testimony that it was mostly funded by federal dollars and some  
15 funded by state, and we argued that more than a thousand  
16 dollars of this was federal.

17                  THE COURT: Whose testimony was it was mostly funded?

18                  MS. POTTER: It was Ms. Austin that said it was  
19 predominantly federal. If you give me one moment, I think I  
20 can find the transcript cite.

21                  THE COURT: Wouldn't that make Ms. Austin's  
22 testimony, at least in the way you used it to the jury, false?  
23 It's false that she received more than a thousand dollars in  
24 federally funded TANF money, and to the degree Ms. Austin was  
25 the evidence you relied on to make that argument -- she said

1       \$2,000 of TANF money, but if what you told the jury she meant  
2       was \$2,000 of federally funded money, then its presentation to  
3       the jury was false, right?

4           MS. POTTER: It was not true that \$2,000 of it was  
5       federally funded. That is correct, Your Honor.

6           THE COURT: I'm not --

7           MS. POTTER: I mean, I --

8           THE COURT: I know that's not true. What I'm trying  
9       to get at is is it not only not true, but did you use  
10      Ms. Austin to prove something that turned out not to be true?

11           MS. POTTER: I don't think we specifically mentioned  
12      Ms. Austin's testimony, to be frank, Your Honor. I don't think  
13      there was much debate or argument at all about the source of  
14      the funding for purposes of TANF. So to the extent --

15           THE COURT: Did you have any other evidence that she  
16      received more than a thousand dollars in TANF money?

17           MS. POTTER: Other than Ms. Austin's testimony, no --  
18      oh, and the document, the TRACS narrative that indicates how  
19      much was in there. So we did have document -- documentary  
20      evidence. That's actually what the jury was referred back to  
21      for purposes of their questions. When the jury asked the  
22      question about how much of SNAP and TANF was received, they  
23      were referred to the specific pages of the TRACS narrative for  
24      purposes of determining it. So there was that evidence.

25           THE COURT: All right. Thank you both.

1                   So then in terms of false testimony, false testimony  
2 or argument, I guess, is sort of how you briefed it, you want  
3 to allege at least two things, right? You want to allege that  
4 Ms. Austin's testimony, as utilized by the United States at  
5 trial to support the idea that she got more than a thousand  
6 dollars in federally funded TANF money was false. Right so  
7 far?

8                   MR. AHLEMEYER: Yes, Your Honor.

9                   THE COURT: And then on a somewhat related issue, you  
10 want to use the TRACS documents to show that the argument that  
11 your client just made up yesterday, that she hadn't actually  
12 been receiving TANF money or didn't think she had been, that  
13 that's belied by documents that would have made that  
14 argument -- that now make that argument false, correct?

15                   MR. AHLEMEYER: Absolutely. And especially that it  
16 was -- that argument was specifically contrasted to  
17 Investigator Austin's testimony.

18                   THE COURT: What else are you alleging by way of  
19 false testimony documents or argument?

20                   MR. AHLEMEYER: In terms of false testimony, I'm  
21 relying on Ms. Austin's statements as to the TANF.

22                   THE COURT: Well, then what about the TRACS?

23                   MR. AHLEMEYER: The TRACS narrative that the  
24 government just referred to, that one?

25                   THE COURT: Well, no. I thought you were also making

1 the argument that the closing argument saying that, you know,  
2 your client just made this up yesterday, ends up belied by the  
3 documentary evidence produced after trial. Right?

4 MR. AHLEMEYER: Absolutely. I think that was a false  
5 statement.

6 THE COURT: Anything else?

7 MR. AHLEMEYER: In terms of false statements, no.

8 THE COURT: So I want to make sure I understand the  
9 universe of things that you're claiming justify either  
10 dismissal or new trial. It's those two plus what else?

11 MR. AHLEMEYER: The universe of documents themselves.

12 THE COURT: Let's start with documents, and then I'm  
13 going to go to testimony, and then I'm going to go to argument.

14 MR. AHLEMEYER: The documents I presented in court  
15 are the only ones that I had that showed her testimony about  
16 receiving pre-SSI could have been supported by documents. So  
17 yes, that's the ones I'm relying on for that, that she actually  
18 received pre-SSI --

19 THE COURT: Your argument for new trial or dismissal  
20 is fundamentally grounded in *Brady*, right?

21 MR. AHLEMEYER: *Brady*, yes.

22 THE COURT: So *Brady* is failure to produce. So  
23 specifically what did the government fail to produce by way of  
24 documents?

25 MR. AHLEMEYER: All of the attachments that I have

1 put together, and anything that would again -- my documents --

2 THE COURT: That's the deposit records, the TRACS  
3 narrative, and the jurisdictional email chain, right, and  
4 related documents?

5 MR. AHLEMEYER: Exactly, related documents on that.

6 THE COURT: And then *Brady* can also be false  
7 testimony. And that's Ms. Austin basically?

8 MR. AHLEMEYER: Correct, Your Honor.

9 THE COURT: And *Brady* can be grounded in improper  
10 argument not founded in true evidence, and that's the argument  
11 that your client just made up this TANF argument yesterday?

12 MR. AHLEMEYER: Yes, Your Honor.

13 THE COURT: Is that it?

14 MR. AHLEMEYER: With respect to this claim, yes. I  
15 have more on the dismissal, because I think it goes beyond the  
16 evidence, but --

17 THE COURT: Let's start with the new trial, then.

18 So, all right. So I've got to look at several things  
19 to decide if a motion for new trial grounded in *Brady* is well  
20 taken. And there are several elements the case law suggests I  
21 look at. One is was the omitted or suppressed evidence  
22 favorable to the defendant, would it have been favorable.

23 And so setting aside for one moment the potential  
24 dismissal of Count 3, just asking at trial would that evidence  
25 have been favorable to the defendant, the answer as to all

1 three of the categories of evidence, documentary evidence I  
2 just listed, the answer is yes, it would have been favorable.

3 Now, this doesn't exactly describe what to do about  
4 unfavorable but false argument or testimony, but I think I have  
5 to try to flip that around and just say was it false testimony,  
6 and then was it false testimony that was unfavorable to the  
7 defendant. I think the answer to that is yes in each instance.

8 The second question is was it suppressed. And here  
9 we come to the *Raley* case. I think the money quote is, "Where  
10 defendant is aware of the essential facts enabling him to take  
11 advantage of any exculpatory evidence, the government does not  
12 commit a *Brady* violation by not bringing the evidence to the  
13 attention of the defense."

14 So your client actually reached out for some of these  
15 documents prior to trial. Why doesn't *Raley* mean there's no  
16 suppression by the United States and therefore no *Brady*  
17 violation?

18 MR. AHLEMEYER: Your Honor, I think *Raley* has been  
19 cabined in some cases since then, including the *Tennison* case,  
20 570 F.3d 1078. It clearly doesn't stand for the proposition  
21 that anything the defendant could be aware of, as said in  
22 *Tennison*, no longer means the government can have suppressed  
23 it. And I think that's the key issue.

24 But more importantly, I think it's very  
25 distinguishable in this case, because in *Raley*, we're talking

1 about third parties' documents, something that the defendant  
2 clearly knew he had been in this pretrial custody, that he had  
3 seen medical help, that there would be documentation of that.  
4 It wasn't something that was necessarily even in the  
5 government's possession.

6 Here we're dealing with a totally different scenario,  
7 where the agency that contests these documents was one of the  
8 prosecuting agencies. It was the case agent. So I think it's  
9 a very different analysis in *Raley*, and *Raley* is easily  
10 distinguishable.

11 I would add on the factual part of that, we do have  
12 additional evidence that Ms. Cobat actually asked for those  
13 records significantly earlier than that January date. In the  
14 same exhibit that I attached, Exhibit A to the motion to  
15 dismiss, the prior two narratives show that she actually asked  
16 for these documents, her entire DHS file, in October -- on  
17 October 17th, 2016.

18 I also have DHS's -- and I'm happy to provide this as  
19 an exhibit, her request dated October 17, 2016. And I don't  
20 know in the DHS part, I don't know what happened, but both the  
21 "denied" and "delayed" boxes are checked. So I think what my  
22 client did is made every possible effort to get these records,  
23 filled out a form, was either denied or delayed, for reasons  
24 that I would love to have testimony on. She didn't get those  
25 records.

1                   So the January -- that was actually a follow-up, when  
2 she went in there and wasn't quite clear on what the deposit  
3 records meant. She got them, said, well, you know, this is  
4 enough for my attorney to do something with. Obviously the  
5 records she got were not sufficient and were not the ones we're  
6 talking about today.

7                   THE COURT: So your two arguments for distinguishing  
8 *Raley* are that *Raley* involved true third-party custody of the  
9 relevant documents, and here your client made efforts to get  
10 the documents and was -- was in some sense denied?

11                   MR. AHLEMEYER: Correct, Your Honor.

12                   THE COURT: All right. And your authority for, as  
13 you say, cabining *Raley* is what again?

14                   MR. AHLEMEYER: It's discussed in *Tennison v. City*  
15 *and County of San Francisco*, 570 F.3d 1078.

16                   THE COURT: And in your view, in what way does  
17 *Tennison* limit *Raley*? What's the holding?

18                   MR. AHLEMEYER: Well, in this case, they  
19 determined -- it was again a type of suppression, information  
20 in police files. This is actually not a criminal case, this is  
21 the 1983 after it, but they're analyzing whether it was *Brady*  
22 material.

23                   And essentially the defendant was aware that a  
24 certain witness had perhaps made favorable statements. That  
25 was the argument of police inspectors who had not produced

1 certain notes. So because the Court analyzed, well, because  
2 the defendant knew that this witness might have had some  
3 helpful information, they could have gone and talked to that  
4 witness, asked that witness, they didn't do that, and the Court  
5 said -- and the inspector cited *Raley* for that proposition, and  
6 the Court said no, that's not good enough. They happened to  
7 know that this witness might have good information, it was in  
8 the police files, and needed to be turned over. So to me,  
9 that's a closer one when we're talking about the agency or the  
10 investigators.

11 But I do, Your Honor -- that is a focal point of this  
12 Court. *Raley* is a very interesting case, and there's been  
13 arguments back and forth about this. I'm not sure it's  
14 entirely clear how the Ninth Circuit is currently measuring  
15 this idea of what the defendant is on notice about and what  
16 they need to get.

17 In the government's initial response to the motion  
18 for a new trial, they cited -- I believe it was the *Aichele*  
19 case, which that -- it sort of built on all of these, including  
20 *Raley*, built on that holding initially. That was held to be  
21 dicta by *Benn v. Lambert* in 2002. That's 283 F.3d 1040.

22 THE COURT: Its foundation was dicta four years  
23 before *Raley* says it was not dicta?

24 MR. AHLEMEYER: No, I'm sorry. The foundation that  
25 this line of cases was built on. So *Raley* did come back and

1 use that initial holding. The Ninth Circuit said this is still  
2 an open question.

3 THE COURT: When did the Ninth Circuit say that and  
4 where?

5 MR. AHLEMEYER: It said that in the -- in *Benn v.*  
6 *Lambert*.

7 THE COURT: Four years before *Raley*?

8 MR. AHLEMEYER: Right. So then *Raley* came out, and I  
9 think as *Tennison* shows, and later cases that I don't quite  
10 have at my fingerprints right here, that this is a debate about  
11 really what are the contours. It's certainly not as broad as  
12 the government suggests, that any public record --

13 THE COURT: I guess I'm not sure why you don't have  
14 them at your fingerprints, Mr. Ahlemeyer. This is your weakest  
15 link, whether there was suppression or not. If *Raley* says  
16 there wasn't and you've got an argument that *Raley* doesn't mean  
17 what it says, I wish I had it right front of me.

18 MR. AHLEMEYER: Well, I do have *Milke v. Ryan*, 2013,  
19 another one that discussed this. And that specifically said  
20 that the Court -- this was an issue of impeachment evidence of  
21 an officer who testified at a trial. And the Court held there  
22 that "The court documents showing this officer's misconduct  
23 were available in the public record doesn't diminish the  
24 state's obligation to produce them under *Brady*."

25 So what I'm getting at is there's a lot of cases on

1 this issue, and that one line from *Raley* I don't think is going  
2 to be the controlling approach from the Ninth Circuit.

3 THE COURT: Thank you.

4 For the United States?

5 MS. POTTER: Well, Your Honor, I would disagree. I  
6 believe *Raley* does control here, and I think one important  
7 point is the defense counsel was aware of the request from  
8 October 2016 because that was part of the discovery and the  
9 TRACS records that were turned over to defense counsel.

10 THE COURT: How does that help you? If you know your  
11 client sought the records and was denied, then that means  
12 you're supposed to seek them again?

13 MS. POTTER: Well, the TRACS records do not say they  
14 were denied. This is -- we did not have this document, and I  
15 have not seen it.

16 THE COURT: Do you want to take a look at it?

17 MS. POTTER: Yes.

18 MR. AHLEMEYER: (Handing.)

19 I have a copy available for the Court as well, if the  
20 Court would like to see that.

21 THE COURT: Yes.

22 MR. AHLEMEYER: Should I put a defense exhibit  
23 sticker on that?

24 THE COURT: Yes.

25 MR. AHLEMEYER: Would the Court prefer a new set of

1 exhibit numbers for this hearing or should I just continue with  
2 whatever it was?

3 THE COURT: Call it Exhibit A.

4 MR. AHLEMEYER: Okay.

5 MS. POTTER: Your Honor, I believe it shows that she  
6 requested them on October 2016, and then that she was given  
7 information in January of 2017, which it originally says  
8 "denied," and then it says "delayed," and -- but then it says  
9 she visited the office on -- at the bottom, January 18th, 2017,  
10 and received a payment printout and told the worker this was  
11 enough -- this was enough information requested, which we  
12 argued, which is that prior to trial, she did have the  
13 information she wanted from DHS, and that's what those January  
14 TRACS records reflect.

15 I think the other point is she even had been asking  
16 DHS, but there's no request from counsel to the government to  
17 receive these records. And this is a -- you know,  
18 unfortunately, a fairly common occurrence, where defense  
19 counsel reaches out to some agency for whatever reason and they  
20 can't get the records they want. I frequently receive calls  
21 from defense counsel, "Hey, the VA or BOP won't give me this  
22 information. Can you call them and get it for me?"

23 There's nothing that -- we would have happily  
24 obtained the records that were requested, but I think what  
25 happened, or what it appears to reflect on this form in the

1 January 2017 TRACS record, that she eventually did get what she  
2 wanted and there was no need to ask the government for  
3 information.

4 The problem for Ms. Cobat and for this argument is  
5 that the information didn't show what she wanted it to show,  
6 because what it does show is that she was receiving a type of  
7 TANF, and her argument was she was never receiving TANF, and  
8 she told everyone she wasn't receiving TANF.

9 THE COURT: We'll get to prejudice in a minute. I'm  
10 now just looking at suppression.

11 So your argument initially is that *Raley* says no  
12 suppression, and then the government's -- excuse me, the  
13 defense's response to that is, well, maybe *Raley* shouldn't  
14 apply if -- well, one, if it's in the possession not of the  
15 hospital or doctor's office or something like that but in the  
16 possession of one of the investigating prosecuting agencies in  
17 the case itself, right?

18 MS. POTTER: Yes, though --

19 THE COURT: That is a distinction that's not  
20 frivolous, wouldn't you agree?

21 MS. POTTER: I agree that it's not frivolous. I  
22 would say I do not believe Oregon DHS was a prosecuting agency.  
23 It's a separate agency that administers benefits.

24 And he did cite cases, some of those names I  
25 remember, but I did not prepare those cases for argument, but I

1 do not believe that any of those cases hold that *Raley* doesn't  
2 apply when it's a government agency, for example, in this case,  
3 when it's Oregon DHS. I do not -- I'm not aware of any Ninth  
4 Circuit case that would hold in this fact scenario there was  
5 suppression solely because we were prosecuting a theft of  
6 benefits case and the documents came from one of the agencies  
7 that paid out benefits. So I believe *Raley* does control here.

8 THE COURT: We know a couple of goalposts, I guess.  
9 We know that *Raley* applies sort of undiminished when the  
10 records are just in the custody of some third party, say a  
11 doctor, and the defendant knows that he's -- he or she has been  
12 to the doctor and could ask the doctor for the records.

13 MS. POTTER: Yes.

14 THE COURT: There's some question being raised about  
15 whether *Raley* continues to apply in the other extreme, which is  
16 that yes, there are records, and yes, the defendant knows about  
17 them, but they're in the possession of the prosecuting agency.  
18 If you're being prosecuted by Multnomah County DA's office and  
19 the PPB has the records, maybe it wouldn't apply. You're being  
20 prosecuted by the U.S. Attorney's Office and the FBI has the  
21 records, maybe we wouldn't apply *Raley* directly in that  
22 setting. And we're in between here. So I don't know -- I'll  
23 have to take a closer look at this.

24 But in any event, absent some exception, in my view  
25 *Raley* applies at least in part. And I'll take another look at

1 this. But it means there's no suppression at least as to some  
2 of the documentation.

3 As to the documentation that there is not the  
4 statutorily required federal funding amount, those documents I  
5 don't think Ms. Cobat could have gotten from anybody on her  
6 own, right?

7 MS. POTTER: Well, I believe she could have asked --  
8 the defense counsel could have asked the prosecution to verify  
9 it, and they would have been forced to go back and double-check  
10 that fact. And defense counsel did not ask for those.

11 THE COURT: That's not the *Raley* rule, though.  
12 That's something entirely different, right?

13 MS. POTTER: That is a different rule, but I believe  
14 it's a rule that should apply to this case.

15 THE COURT: So you say was it suppressed, and the  
16 answer is no if -- I guess your rule is the answer is no if  
17 nobody asked for it?

18 MS. POTTER: No, the answer is no when the government  
19 provided nothing -- the government didn't provide some document  
20 that said this is federally funded. The government simply  
21 stated that this was federally funded, and there was grand jury  
22 testimony that said that TANF is funded federally and through  
23 the state, and there was no -- there's no argument or question  
24 about that. Defense counsel never sought out to clarify how  
25 much was federally funded and how much was state funded, and

1 that was information that the defense could have sought out.

2 THE COURT: All right. Thank you.

3 I think there's at least a strong possibility that  
4 there is suppression as to the jurisdictional limit documents,  
5 and currently, until I get more on this matter, I think *Raley*  
6 applies to the rest.

7 The next prong is prejudice. And here I'm going to  
8 come immediately back to the jurisdictional documents. And  
9 there the only prejudice as to not receiving the jurisdictional  
10 documents -- those aren't credibility documents in any way.  
11 That issue is not a credibility issue, whether she meets the  
12 jurisdictional amount or not as to Count 3.

13 MR. AHLEMEYER: It has nothing to do with her  
14 credibility.

15 THE COURT: So I don't find prejudice for the  
16 potential suppression of the documents that simply show the  
17 lack of federal funding. It's a close distinction because I'm  
18 going to come back to Ms. Austin's testimony here in a minute  
19 more generally, but just the bare documents about, you know,  
20 federal funding themselves, separate from any false testimony  
21 that might arise from it, those are two different things in my  
22 mind.

23 MR. AHLEMEYER: May I inquire about that distinction,  
24 Your Honor? Because the way I had thought about it, really  
25 we're looking at whether there's a realistic likelihood of a

1 different outcome at trial is how we measure prejudice overall.  
2 I understand this jurisdictional material to answer 100 percent  
3 yes, there would have been --

4 THE COURT: Well, sure it does. It answers 100  
5 percent yes as to Count 3.

6 MR. AHLEMEYER: Yes, talking about that, yes. There  
7 are arguments I have about --

8 THE COURT: To bleed over, to infect the other  
9 counts, this is all sort of under the table for the jury. So  
10 except to the degree that you have an argument that Ms. Austin  
11 testifying falsely might generally infect other counts, but  
12 just the documentation, I mean, for one, that probably never  
13 would have gone to the jury in any meaningful way. I agree  
14 it's 100 percent prejudice as to Count 3, but in my view only  
15 as to Count 3. That's just those documents.

16 MR. AHLEMEYER: Sure. Sorry.

17 THE COURT: Go ahead.

18 MR. AHLEMEYER: I was just going to say, you know,  
19 the government does raise the issue of Investigator Austin was  
20 never asked these questions, so I don't know how she would have  
21 answered it, but I do think, based on what she said in the  
22 grand jury and her direct testimony --

23 (A cell phone rings.)

24 THE COURT: I'm sorry, just a moment.

25 I don't want anything else to go off in this

1 courtroom. The next person who has a device go off in this  
2 courtroom will be escorted out. So turn off all your devices  
3 now.

4 Mr. Ahlemeyer.

5 MR. AHLEMAYER: Sorry, Your Honor.

6 So I was just going to say because I think the  
7 credibility of both the investigators and all the DHS witnesses  
8 was so critical, that showing that there was, you know, lapse  
9 in communication, that it wasn't a thorough investigation would  
10 bleed over into the other counts.

11 THE COURT: We'll come to that.

12 Talking about this at trial versus just the  
13 nondisclosure of the bare documentation post trial are two  
14 different things.

15 So if there's no suppression on some of these, I  
16 don't ask the prejudice question, I ask it where there's  
17 suppression. And Mr. Ahlemeyer is right. I'm looking at  
18 whether it undermines confidence in the outcome or  
19 alternatively creates a reasonable probability that the result  
20 would have been different.

21 I want to think about the nature of the potential  
22 prejudice, then, from Ms. Austin's testimony and the closing  
23 arguments and that cluster of things, separate from the bare  
24 documentation.

25 So here's how I see it, and I invite you to correct

1 me if I've oversimplified what happened at trial, but the  
2 defendant's main defense here was a lack of intent or perhaps  
3 lack of the knowing element of the counts. And I'd sum it up  
4 colloquially this way. Her argument essentially was I didn't  
5 know or understand that I couldn't get these benefits if I had  
6 sole legal custody but not actual physical custody of my son.  
7 That's her main argument: I had some confusion or maybe even  
8 just an improper understanding of what was going on.

9 And the government's main response to that was to say  
10 that she's lying, that she is, in fact, a liar. And that  
11 worked two ways. One, that the government's argument goes, she  
12 lied repeatedly about whether her son lived with her, whether  
13 he or she got the money, and so that supported the government's  
14 argument that if you're just confused or mistakenly believe  
15 you're entitled to benefits, based on just legal custody alone,  
16 then you don't need to tell these lies. That's the first use  
17 of the testimony the government put on that she's lying.

18 And the second is that because she is a liar, so says  
19 the government, you don't need to believe her when she now says  
20 she's confused. That seems to me to be the core of what we're  
21 talking about when we talk about the impact potential at trial  
22 of Ms. Austin's testimony and the potentially improper argument  
23 in closing that she's just making up a defense right now that  
24 she's never asserted before.

25 I'm sort of in a phase two, Mr. Ahlemeyer. I've

1 tried to cover the documents themselves. Does that cover  
2 everything but the documents that you're concerned about here  
3 that would lead to either a new trial or dismissal?

4 MR. AHLEMEYER: Certainly not dismissal, Your Honor,  
5 because I think another --

6 THE COURT: That's right. We'll come back to  
7 dismissal.

8 But as to new trial, this sort of radiating inference  
9 of the documents that led to these false statements and these  
10 false statements on the other counts -- of course Count 3 will  
11 be gone. On the other counts is the core of your new trial  
12 argument, right?

13 MR. AHLEMEYER: I would agree that's the core.  
14 Certainly with Count 1, I've incorporated all the benefits, so  
15 particularly related there.

16 THE COURT: Right. So I think of it this way -- if  
17 you'll forgive me. Let me just finish this out and then I'll  
18 hear from you again.

19 Because of the nature of the defense and the nature  
20 of the government's response at trial, I think my question  
21 today is do the *Brady* violations create a reasonable  
22 probability that the result would have been different, or put  
23 another way, is the evidence, untainted by *Brady*, if there is  
24 any, that she lied strong enough to overcome any reasonable  
25 probability that the *Brady* violations contributed meaningfully

1 to the jury's decisions. Did the jury use the evidence --  
2 evidence and arguments they never should have heard to convict,  
3 or did they -- or even if you pulled all that out and gotten  
4 rid of all the taint, did they have enough to go on to convict  
5 on the other counts anyway.

6                   And I do want to throw in briefly, I think, when we  
7 talk about now not just *Brady* suppression but false testimony  
8 evidence, then you've got to talk about the *Mooney-Napue* line  
9 of cases, and it's really the same question: Was the testimony  
10 actually false? Did the prosecution know or should it have  
11 known it was false? And was that false testimony material?

12                   So maybe to state it even more generally, what was  
13 the impact on the jury of hearing Ms. Austin's testimony and  
14 hearing the closing argument that Ms. Cobat just made this up  
15 yesterday, both of which were improper?

16                   Mr. Ahlemeyer.

17                   MR. AHLEMEYER: I think I couldn't overstate how  
18 important it is. First I would say, just to back up one  
19 moment, I think there is a slight difference in the *Napue*  
20 versus *Brady* analysis in terms of measuring the ultimate  
21 outcome, with *Napue* being slightly lower on the could a jury  
22 have reasonably found differently, as opposed to would the jury  
23 have. So just to flag that for the Court.

24                   THE COURT: Thank you. I think that's correct.

25                   Go ahead.

1                   MR. AHLEMEYER: Excuse me. I think, you know,  
2 overall this really did come down to a credibility contest.  
3 What they're saying are lies are generally Ms. Cobat writing  
4 "lives with her son" in these forms, and these forms are not  
5 produced in isolation. So I think the jury is really assessing  
6 numerous witnesses from the agencies who said, you know, we are  
7 very professional, we read this script, we hear what the client  
8 says, we write it down exactly, this is what she says, TRACS  
9 narratives are accurate.

10                  And Ms. Cobat's defense, as the attorney at trial  
11 brought up, is these forms don't have many of the issues that  
12 she had. They don't ask about parenting time, they don't ask  
13 about custody time. So it really does come down to testimony  
14 between her and these witnesses about how these conversations  
15 went.

16                  And I think the government did take advantage of  
17 that, once they were able to say she's not credible based on  
18 Ms. Austin's testimony, that she's created this last-minute  
19 defense. The closing goes on to talk about how these social  
20 workers are good people trying to help people, and instead  
21 she's a fraudster.

22                  So I think it's clear there was this credibility  
23 difference. It's happening in conversations that are not  
24 recorded, and their witness -- the government was able to  
25 present their witnesses as very believable, accurate, and

1 professional, and Ms. Cobat as the opposite by seizing on this  
2 issue.

3 THE COURT: Let me ask it to you this way. And  
4 it's -- I'm going to give you an opportunity when I'm done with  
5 this hypothetical to explain to me why it doesn't apply here.

6 But is it possible for the United States to put on a  
7 case like this where it's a credibility contest in some ways,  
8 and show that the defendant lied in 20 meaningful ways, and  
9 then post trial we learn that the government was wrong in  
10 asserting two of those lies, that *Brady* or other issues mean it  
11 never should have put on that evidence or made that argument?

12 Is it possible to have a case where nevertheless we  
13 have no question that the other 18 lies would have been more  
14 than enough to -- were more than enough to completely persuade  
15 a jury of guilt?

16 MR. AHLEMEYER: I would absolutely agree, Your Honor,  
17 this is not a sufficiency of evidence test. So yes, those  
18 cases could exist.

19 THE COURT: Meaning you can have such powerful  
20 evidence otherwise, non-*Brady* and tainted evidence otherwise,  
21 that you don't really have much question that the jury would  
22 have convicted anyway, even if you have could fix the *Brady*  
23 problem?

24 MR. AHLEMEYER: I would be very concerned on a  
25 straight credibility question of that. So --

1                   THE COURT: All right. So in this case, there was  
2 other evidence. You've pointed to some of it. But there's, of  
3 course, much other evidence utilized in the closing argument at  
4 trial of her making a variety of false statements, not just  
5 checking forms.

6                   MR. AHLEMEYER: There were allegations thereof. The  
7 ones I can think of that the government has and continues to  
8 brief on are -- were not actually rebutted by any specific  
9 evidence. So the closing was -- you know, one of the  
10 categories was, "oh, really," or something to that effect of  
11 she's just not believable. Those are with respect to purchases  
12 perhaps made on the EBT card.

13                  The government didn't ask Bryce about those, and so  
14 there was no rebuttal to her statements that "This is what I  
15 spent the money on. I purchased something for Bryce here."

16                  They could have asked him did you ever get anything  
17 from this store or that store? That wasn't done. So I guess I  
18 see more of an argument response in closing than I do an  
19 evidentiary one.

20                  THE COURT: All right. So, in any event, your idea  
21 is that in a credibility contest, if one or two of the  
22 important points of credibility end up being tainted, and then  
23 you just can't know what the jury did with those versus the  
24 others?

25                  MR. AHLEMEYER: Absolutely, because I don't know how

1 a jury would have weighed those other 18 versus two. Maybe  
2 these two were so important that they colored the view of the  
3 others.

4 THE COURT: All right. Thank you.

5 MS. POTTER: Thank you, Your Honor.

6 On the first point, or the legal argument, I do  
7 believe that you can assess the rest of the evidence, even if  
8 you find that there was one issue. So, for example, if you're  
9 going to find there might have been a false statement about  
10 what she said, I think the *Johnson* decision out of the D.C.  
11 Circuit and the *Lazarenko* decision from the Ninth Circuit say  
12 you look at the evidence as to the rest of the counts, if that  
13 evidence was overwhelming.

14 So if the government can put forward -- and I believe  
15 we can, and I'll go over it -- overwhelming evidence of her  
16 lies and credibility issues, the jury would have concluded  
17 regardless of that statement that she was not credible, then I  
18 think the Court can deny the motion for new trial and certainly  
19 any dismissal motion.

20 And so defense counsel has focused specifically on  
21 this notion of legal custody versus where she was living, and  
22 that was the key credibility issue. But there were other lies  
23 that I think were very critical and some were on documents that  
24 were inconsistent with each other.

25 For example, in Trial Exhibit 11, which is the 2014

1 rep payee report, she reports her son lived with her in Lebanon  
2 the entire time. But then in September of 2016, she had told  
3 DHS that she had moved to Redmond. So there you have two  
4 completely different addresses. And some of that appeared to  
5 be strategic, from where benefits were placed.

6 So then she also says, when she's telling DHS for the  
7 Exhibit 11 that she was living in the Lebanon area in the  
8 Mayfair address, the government offered someone who rented a  
9 house during that exact period and said she never lived there.

10 In addition, that renter testified that when she went  
11 to go to the house to look at it to rent, there was another  
12 renter there.

13 There were also all of her statements about how she  
14 never lived with Tim Fox. And those were overwhelming, because  
15 you not only had the testimony of the probation officer, you  
16 had the testimony of the renter and you had the testimony of  
17 her son, all saying she was living with Tim Fox, with multiple  
18 documents where Tim Fox was signing off that he was living with  
19 her. We had her documents regarding what the rules were that  
20 said he was going to live with her. We have the testimony that  
21 they shared a room together and we have the repeated testimony  
22 that Bryce was never there.

23 So then she takes the stand and she doesn't just say  
24 that she was confused about, you know, legal custody versus  
25 physical custody. She testifies that Bryce is there all the

1 time, that he comes, that he has a room. No one ever testified  
2 that they saw Bryce at the home. And indeed he could not be  
3 there when Tim Fox was there.

4 In terms of the monetary spending, in terms of  
5 whether it was just an argument, well, that's the job of the  
6 jury to assess the credibility of the witness.

7 She testified that she bought cologne at the  
8 Victoria's Secret and soda and ice at the liquor store for her  
9 son. The jury evaluated that, decided whether she was credible  
10 as to that statement, much like they assessed whether she was  
11 credible in 2016, when she told the Social Security  
12 Administration that she hadn't lived with her husband during  
13 that entire period of time.

14 THE COURT: Based on what do I decide that the jury  
15 relied on the Victoria's Secret and liquor store evidence to  
16 find her not credible?

17 MS. POTTER: Well, I don't think they relied on just  
18 that. They had all -- I guess what I'm disputing is --

19 THE COURT: One of the things you're asking me to do  
20 is make a tally of all of the ways in which you have proof that  
21 she lied that are in some way sealed off from any taint of the  
22 *Brady* problem.

23 MS. POTTER: Yes.

24 THE COURT: And I'm not sure based on -- I'm not sure  
25 how I go about doing that.

1 MS. POTTER: I think you look at all the documents  
2 and all the false statements on the documents, and I think they  
3 can assess her -- what we're focused on is one statement during  
4 rebuttal closing about that this was the first time she had  
5 raised the argument. That was not the focus of the  
6 government's case nor was it a key piece of evidence for  
7 purposes of the government's case. The government's case  
8 was --

9 THE COURT: Well, the closing argument spends a lot  
10 of time on TANF money. That's for sure, right?

11 MS. POTTER: Right.

12 THE COURT: Is the count now gone from the case?

13 MS. POTTER: Yes. But I'm sorry, I was focusing on  
14 the statement that this was the first time she had raised this  
15 defense. And that statement I do not think was the cornerstone  
16 for deciding that Ms. Cobat was not credible in this trial. I  
17 don't think that that had really any bearing on her  
18 credibility. It was the other overwhelming evidence that bears  
19 on her credibility for purposes of the jury determining whether  
20 she had the requisite intent to commit these crimes. And I  
21 think there is, and we've gone through in our motion, and we  
22 have differing exhibits which shows she presented at almost  
23 identical periods of time different information to both DHS and  
24 to SSI about where she was living and who she was living with.

25 And I also want to point out, just because we talked

1 about how accurate the TRACS records were, she testified that  
2 as of April 2012, she didn't believe she was receiving TANF  
3 benefits anymore. That's her defense. But in October of 2012,  
4 those same TRACS records show she contacted DHS and said, "Why  
5 didn't I get more TANF?"

6 So to the extent she wants to say since April 2012,  
7 "I hadn't been receiving TANF," the jury could have reviewed  
8 TRACS records and seen, well, in October of 2012, she was  
9 calling to ask about her TANF, so how can she say in April of  
10 2012 she didn't receive TANF when she's asking why she didn't  
11 receive more of it in October?

12 So I think there's plenty of other issues throughout  
13 the TRACS narrative that point to also her lack of credibility.

14 THE COURT: All right. Thank you.

15 MR. AHLEMEYER: I think if anything, the TRACS  
16 narratives highlight the different mixed messages she's  
17 getting. She's talking to different representatives who would  
18 then say, "Oh, no, you're not on TANF, you're still in the  
19 pre-SSI," or "Pre-SSI ended and you're now in TANF."

20 So there's a give and take, and I think that would  
21 have only supported the defense argument that the agency  
22 representatives were communicating back and forth, and there is  
23 a give and take, and there could be confusion and that she was  
24 receiving mixed messages.

25 I do want to go back to the government highlighted

1 Exhibit 11. This is a misstatement on it. What they didn't  
2 address is she said on that document, "Yes, I have been  
3 convicted of a felony in the past year," which was untrue. So  
4 this is part of what we're talking about is on the very same  
5 document she's making a statement that is clearly false that  
6 the agency doesn't catch that would have meant she gets no  
7 benefits.

8 So her confusion is important here, and you can't  
9 just isolate one line and say, well, the jury would have  
10 focused on that. In any event, that was part of the defense is  
11 that she was confused as to what "lives with" means, and that  
12 gets fleshed out in her conversations with the representatives.  
13 So that's why we think credibility is just incredibly important  
14 here. So --

15 THE COURT: What's your additional argument on your  
16 motion to dismiss?

17 MR. AHLEMEYER: My primary argument that I wanted to  
18 bring up is in response to the government's latest filing. And  
19 as I mentioned, I see the categories of *Brady* material in two  
20 different ways, one focusing on the intent and the other on the  
21 jurisdictional element.

22 And as the government cited in its own brief, one of  
23 the factors the Court should look at is the government's  
24 willingness to own up to the problems in this case and what has  
25 happened, and that's something that I found a lot of

1 disagreements with their response.

2                   And the first one I'll highlight is a very simple  
3 one. Although they dismissed Count 3, failure to have the  
4 jurisdiction, they conclude the government did not commit a  
5 *Brady* violation. I mean, to me, as I highlighted earlier, I  
6 think this is a 100 percent *Brady* violation. There was  
7 material that was not turned over that would have shown  
8 Ms. Cobat could not be convicted of the crime she was convicted  
9 of. So that was the first thing that troubled me when I saw  
10 that.

11                   But probably more so was the government's assessment  
12 of the timeline here. And in their latest motion, on page  
13 12 -- and I quote -- "After defense counsel said that he  
14 believed the funds were not federally funded, the government  
15 promptly reached out to DHS to verify the funding," citing to  
16 the declaration.

17                   The following page, page 13: "As soon as the  
18 government was made aware of this issue, it promptly  
19 investigated and learned of the error."

20                   Again citing to the declaration, paragraph 21 and 22,  
21 the declaration says that the lead counsel did not learn -- on  
22 January 23rd, 2018, lead counsel had a conference call with  
23 me -- with the defense -- and during this conference call she  
24 realized for the first time that the defense was questioning  
25 whether the pre-SSI -- whether TANF or not -- was federally

1 funded.

2 I don't know what to make of that, because that's  
3 January 23rd. On December 28th is when I filed the motion for  
4 a new trial. And I clearly in that motion said: "It is also  
5 not clear that the money Ms. Cobat received was derived from  
6 federal government funding, as required by 18 U.S.C. Section  
7 641. While there was testimony that traditional TANF is partly  
8 funded by the federal government, there was no evidence that  
9 the same was true for the pre-SSI/SSDI program."

10 And then my Exhibit C, which I had attached, suggests  
11 the opposite by repeatedly referencing that Ms. Cobat would  
12 need to repay the state for any benefits received.

13 I can't square that the government claims not to have  
14 known this was an issue a month after I made that point in my  
15 motion. This is not a proper response.

16 And what did the government say? They responded by  
17 saying my arguments were without merit, that reliance on the  
18 new exhibits is misplaced, that I misstate the law, and that  
19 these exhibits would have added nothing of substance to the  
20 trial and are neither material nor exculpatory and urge this  
21 Court to go ahead with sentencing and reject the motion  
22 summarily.

23 So I think that shows a high unwillingness to accept  
24 responsibility for what happened here, and I don't understand  
25 how it took the government a month to figure out that was my

1 argument.

2                   And the last thing I'll say on this point, Your  
3 Honor, is -- and this is perhaps naive, and maybe the  
4 government is doing this anyway, but we have a very experienced  
5 DHS investigator, who has been doing this for 23 years, we have  
6 a very experienced benefits prosecutor, and nobody knew that  
7 there was these subsets of TANF that are not federally funded?  
8 And I hope that the government after this incident has gone to  
9 DHS or any other agency and really tried to figure out what all  
10 these subsets are and are they federally funded or not.

11                   And the other thing I hope the government is doing as  
12 a remedial measure is going back over any convictions in this  
13 district or otherwise that are based on TANF funding, and  
14 making sure that it wasn't pre-SSI, because we all know with  
15 the high rate of plea agreements and, you know, defendants who  
16 will plead is in the upper 90s percentile, that would be  
17 something I'd be very concerned about if I were the government.

18                   So those are remedial actions, you know, falling on  
19 their sword, recognizing this was a *Brady* violation, and taking  
20 steps to remedy that are all things that I see missing in their  
21 response, and I think that's very important for the Court to  
22 consider in evaluating whether or not to exercise its  
23 supervisory power.

24                   THE COURT: Thank you.

25                   Go ahead.

1 MS. POTTER: Your Honor, I'll just start with there  
2 is a lesson here, and it's certainly a lesson that's getting  
3 carried back to the office, which is we're going to  
4 check-double check the responses for 641 in any case where we  
5 have these jurisdictional elements. It happens. We're focused  
6 on, and what we say in closing is nothing is really in dispute  
7 here except the intent, and that's what everything focused on.  
8 So that lesson, that message is sent.

9 THE COURT: Prospectively and retroactively or just  
10 prospectively?

11 MS. POTTER: Prospectively at this point. I will  
12 certainly carry back this issue. I will say that you can't  
13 receive TANF benefits without some of these other benefits also  
14 occurring, so most of the convictions, I would say,  
15 percentage-wise are based on an SSI, and TANF is something that  
16 is added on. The significant benefits typically involved are  
17 SSI or sometimes SNAP, but really these cases start as Social  
18 Security benefits. And I'm not aware -- I'm not claiming to  
19 know everything, but I'm not aware of a solely TANF case that  
20 has ever been prosecuted by our office.

21 THE COURT: That assumes that if someone is convicted  
22 of Social Security fraud, they really just shouldn't care that  
23 they also improperly got convicted of a TANF case, two counts  
24 instead of one, or two counts instead of three. So I think  
25 it's worth a look.

1 MS. POTTER: Certainly, Your Honor, and I will  
2 absolutely look. And I didn't mean to imply they shouldn't  
3 care about that. Obviously I can understand how it would be  
4 concerning. My point was only that I hope that it's a very  
5 narrow or small range of cases. And we will check that.

6 THE COURT: Was there a *Brady* violation in this case?

7 MS. POTTER: I don't believe there was a *Brady*  
8 violation because the violation -- and I understand that the  
9 Court has found it was material and it was suppressed, and the  
10 prejudice has been remedied. So typically when the Court is  
11 looking at was there prejudice, we're talking about someone who  
12 has been convicted and the conviction stands. She's no longer  
13 convicted of this count.

14 So the reason we don't say there's a *Brady* violation  
15 is because we took the measure, the steps to vacate the  
16 conviction. And so that is the reason. There's three prongs  
17 to *Brady*. I understand it's material, and we acknowledge --

18 THE COURT: So there was prejudice, you've just cured  
19 the prejudice. She did get convicted.

20 MS. POTTER: To the extent the Court has ruled that  
21 we suppressed the evidence regarding the source of the funding,  
22 then yes, that was --

23 THE COURT: What's your argument that you did not  
24 suppress the evidence regarding the source of the funding?

25 MS. POTTER: I think the Court has rejected my

1 argument that the defense attorney could have requested and  
2 asked for that same information. I'm not trying to reargue  
3 that, Your Honor, I'm just saying that that was the argument we  
4 made, and that frankly there's no need to make a specific  
5 finding of *Brady* violation because we've dismissed Count 3.

6 In terms of the complaint about the motion, the focus  
7 with the first new trial memo appeared to be, as I interpreted  
8 it, that she wasn't receiving TANF, and that whatever benefits  
9 she was receiving -- I understand there was -- whatever  
10 benefits she was receiving was not federally funded.

11 So the focus of the response to that motion was to  
12 determine whether it was TANF, and the same mistake that was  
13 made in the beginning was made again, which is that TANF is  
14 generally federally funded, we have proven that these benefits  
15 were TANF, and let's respond and let's explain to the Court  
16 that she did receive TANF.

17 THE COURT: You've avoided your opponent's argument  
18 by defining the focus of his memo in a way that doesn't include  
19 an argument he made.

20 MS. POTTER: Well --

21 THE COURT: I mean, his memo in December specifically  
22 included an argument that the federal jurisdictional amount was  
23 at least unclear, right? That's not a question of interpreting  
24 what he was arguing. It's right there in print, isn't it?

25 MS. POTTER: Yes, but to the extent he's trying to

1 imply nefarious actions by the government or a failure to  
2 follow up --

3 THE COURT: I think the argument is that he made an  
4 argument about federal jurisdiction and that argument sort of  
5 got the back-of-the-hand treatment.

6 MS. POTTER: I don't think it got the back of the  
7 hand. I think it wasn't fully understood and thus it was not  
8 followed up on. When it became clear to everyone involved, it  
9 was followed up on and the count was dismissed. Would it have  
10 been better to do it earlier? Absolutely, Your Honor, but I  
11 don't think that this warrants dismissal of this indictment.

12 THE COURT: So I've tried to think about the case in  
13 terms of withheld documents on the one hand and testimony and  
14 argument on the other, because it's, I think, nearly impossible  
15 to apply *Raley* to the latter. It just doesn't apply because  
16 you can't know prior to trial how you're going to access, you  
17 know, an improper closing argument or something like that, and  
18 so I just find really inapplicable to a new trial motion  
19 grounded in the idea that there was either false testimony at  
20 trial or improper argument based on something that shouldn't  
21 have happened.

22 And so as to the nonproduced documents, there is  
23 pending a serious question about whether it was suppressed that  
24 I'm going to allow the parties to submit briefing on one week  
25 from today, simultaneously, on whether *Raley* is good law or not

1 as to the three categories of documents I've identified in this  
2 case that are the subject of defendant's motion.

3 As to the withheld documents in Count 3, we already  
4 know the answer. If I haven't done so already, I formally  
5 grant the government's request to dismiss Count 3.

6 And as to the improper closing argument, in my view,  
7 and in my view the improper testimony of Ms. Austin, which I  
8 read as -- combined with how it was used at trial, I read that  
9 as a way of improperly proving to the jury a receipt of more  
10 than a thousand dollars of federally funded TANF benefits.  
11 That makes that testimony false, and I've tried to apply the  
12 law about false testimony, *Mooney*, you know, to some extent  
13 *Brady* and new trial issues, and I am clear in my mind today  
14 that there is a taint that radiates out from Count 3, at least  
15 as to Count 1, on that evidence. I can't have confidence that  
16 I -- that the jury would do the same thing as to Count 1  
17 with -- or that that didn't create a problem with Count 1,  
18 because Count 1 essentially incorporates Count 3, at least in  
19 part.

20 So I view that as a count that has to fall for many  
21 of the same reasons that the government chose to dismiss Count  
22 1, along with the ones I've expressed, that the jury's  
23 reasoning as to Count 1 would, by my own jury instruction to  
24 them, have necessarily included consideration of this improper  
25 testimony and argument.

1                   And what I do with Counts 2 and 4 depends a little  
2 bit on what I do with suppression or not, the suppression  
3 question or not. So I'm going to wait and take under  
4 advisement Counts 2 and 4, along with the motion to dismiss.

5                   So, as I said, simultaneously, one week from today,  
6 I'll receive from you your briefing on *Raley*, and I'll make a  
7 further decision as to Counts 2 and 4 at that time.

8                   We have Exhibit A. I'll return it to you,  
9 Mr. Ahlemeyer, and that is a part -- I'm going to allow that to  
10 be a part of your *Raley* briefing, you know. I mean, it's the  
11 argument that *Raley* shouldn't apply in cases where the  
12 defendant reaches out to try to get the documents and can't get  
13 them. So I'll return that to you, but the government now has  
14 it, and I don't want to have new discovery and new evidence at  
15 this point, but to the degree that the parties want to try to  
16 explain to me better than I now know what Exhibit A is all  
17 about, you're free to do so in your briefing, and I'll try to  
18 figure out whether that's really what happened or not.

19                   So, Ms. Scheele, can you give us a time -- actually,  
20 one week precisely from today, I'm actually in Eugene. So it's  
21 either Thursday or the following Monday, I guess.

22                   Do you have a preference, Ms. Potter?

23                   MS. POTTER: I'm sorry?

24                   THE COURT: Just for submission of the documents.

25                   MS. POTTER: I would prefer Monday, Your Honor.

1                   THE COURT: All right. So we'll have it submitted on  
2 Monday, because I won't get to it on Friday anyway. That will  
3 give you the extra day. So submit it by close of business on  
4 Monday.

5                   THE CLERK: The 16th.

6                   THE COURT: The 16th.

7                   Thank you all. We'll be in recess.

8                   THE CLERK: Court is in recess.

9                   (Proceedings concluded.)

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4 I certify, by signing below, that the foregoing is a  
5 correct transcript of the record of proceedings in the  
6 above-entitled cause. A transcript without an original  
7 signature or conformed signature is not certified.

8

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10 */s/Bonita J. Shumway*

11 BONITA J. SHUMWAY, CSR, RMR, CRR  
Official Court Reporter

12 *April 10, 2018*

13 DATE

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